

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LENAWEE LONG TERM CARE, INC.
D/B/A PROVINCIAL HOUSE OF ADRIAN

and

Cases 7-CA-45917
7-RC-22397

LOCAL 876, UNITED FOOD AND
COMMERCIAL WORKERS INTERNATIONAL
UNION, AFL-CIO, CLC

Steven Carlson, Esq.,
for the General Counsel.
Todd L. Sarver and E. Michael Rossman, Esqs.,
of Columbus, OH, for the Respondent.
David R. Radtke, Esq.,
of Southfield, MI, for the Charging Party.

DECISION

Statement of the Case

MARTIN J. LINSKY, Administrative Law Judge. On February 18, 2003, Local 876, United Food and Commercial Workers International Union, AFL-CIO, CLC, Charging Party or Union herein, filed a charge against Lenawee Long Term Care, Inc. d/b/a Provincial House of Adrian, Respondent herein.

Two days after the charge was filed, on February 20, 2003, an election was held among a unit of Respondent's employees. The results of the election were 35 in favor of representation and 32 against representation. There were 8 challenged ballots, which would be determinative of the final election results. In addition, both the Union and Respondent filed timely objections to the election.

On May 5, 2003, the National Labor Relations Board, by the Acting Regional Director for Region 7 issued a pleading entitled "I. Complaint II. Report on Determinative Challenged Ballots and Objections III. Order Consolidating Complaint and Determinative Challenged Ballots and Objections IV. Notice of Consolidated Hearing."

Respondent filed an Answer in which it denied the commission of any unfair labor practices in violation of the National Labor Relations Act, herein the Act, as alleged in the complaint portion of the aforementioned pleading.

A hearing was held before me in Adrian, Michigan, on June 4 and 5, 2003.

Upon the entire record in this case, to include post hearing briefs submitted by the General Counsel, Respondent, and the Charging Party, and upon my observation of the demeanor of the witnesses, I make the following:

5 Findings of Fact

I. Jurisdiction

10 At all material times, Respondent, a corporation, with an office and place of business in Adrian, Michigan, has been engaged in the operation of a nursing home.

Respondent admits, and I find, that at all material times Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

15 II. The Labor Organization Involved

Respondent admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

20 III. The Alleged Unfair Labor Practices, the Challenges to Ballots and the Objections to the Election

A. Overview

25 On January 15, 2003, the Union filed an election petition, and pursuant to a Stipulated Election Agreement approved by the Regional Director on January 29, 2003, an election by secret ballot was conducted on February 20, 2003, amongst the employees of the Employer in the following appropriate unit:

30 "All full-time, regular part-time and contingent ancillary aides, CENAs, culinary associates, culinary coordinators, medical records clerks, recreation assistants, recreation coordinators, social services assistants, support services employees, lead ward clerks, and ward clerks employed by the Employer at its facility located
35 at 700 Lakeshire Trail, Adrian, Michigan; but excluding registered nurses, other professional employees, licensed practical nurses, other technical employees, business office employees, guards and supervisors as defined in the Act."

40 There were approximately 80 eligible voters and the tally of ballots reflected a vote of 35 for representation by the Union and 32 against representation.

Both the Union and Respondent filed challenges to some of ballots cast in the election. The Union and Respondent, prior to the hearing, agreed that some of the challenges should be withdrawn and that two (2) of the challenged ballots should be opened and counted at the start
45 of the hearing on June 4, 2003. Those two (2) ballots were opened and counted. One vote was for representation and one vote was against representation. That resulted in a revised tally of ballots of 36-33 in favor of representation. There remained four (4) challenged ballots, i.e., Christine Beck, Barbara Stiers, Angela Colf, and Kathy Matthews.

50 All four (4) challenges were Union challenges. In its post hearing brief the Union withdrew its challenge to the ballot of Christine Beck.

Respondent filed four (4) objections to the election but in its post hearing brief withdrew all four (4) of its objections.

The Union filed eight (8) objections to the election but presented evidence only with respect to four (4) of its objections, i.e., objections numbered 3, 4, 6 and 8. Objections 3 and 4 parallel the unfair labor practices alleged in the complaint.

B. Section 8(a)(1) violations and Union
Objections 3 and 4 to the Election

The Complaint alleges the following unfair labor practices in violation of Section 8(a)(1) of the Act:

“On about February 7 and 11, 2003, Respondent, by its agent, Susan Fillinger, told employees that they could not receive pay increases or corrections to their rate of pay because of the organizing campaign by the Charging Union.”

Sue Fillinger is the Administrator of the nursing home and an admitted supervisor and agent of Respondent within the meaning of Section 2(11) and Section 2(13) of the Act. The unfair labor practices are alleged to have occurred at the facility.

Union objections 3 and 4 set forth below parallel the unfair labor practice allegations.

“3. The Employer, by its agents and representatives, withheld wage increases to bargaining unit employees in retaliation for Union activity, thereby destroying the laboratory conditions and interfering with the employees’ free and fair choice in the election.

4. The Employer, by its agents and representatives, told employees that they would not receive pay increases to which they were entitled because of the Union election, thereby destroying the laboratory conditions and interfering with the employees’ free and fair choice in the election.”

Provincial House of Adrian, Respondent, is a 120-bed long-term care facility located in Adrian, Michigan. It provides residents with nursing, dietary, recreation, physical therapy, occupational therapy, speech therapy and IV therapy services. Respondent employs approximately 115 persons. At all times relevant to this matter, the Administrator at Respondent was Sue Fillinger.

Respondent is part of the North Region of the Pro Medica Health System, which is also known as the Lenawee Health Alliance. Respondent is managed by Pro Medica Continuing Care Services, Inc. Other North Region facilities include the Bixby Medical Center and Charlotte Stephenson Manor, also located in Adrian, and Herrick Memorial Hospital, which is located in nearby Tecumseh, Michigan.

On February 7, 2003, Respondent held a meeting at its facility during which the Union’s organizing drive was discussed. Speaking at the meeting was Pro Medica’s Senior Vice President of Senior Services, Gary Cates. The meeting was attended by a small group of Respondent’s employees, including certified nursing assistants Connie Booth and Pamela Schroeder. Respondent’s Administrator, Sue Fillinger and a Director of Human Resources for Pro Medica Continuing Care Services, Amie Richardson, also attended the meeting. During the meeting, Cates showed the assembled employees an overhead projection setting forth a

comparison of wage rates of the certified nursing assistants at Respondent's Adrian facility with the wage rates of a nearby unionized facility. General Counsel Exhibit 4. Cates explained to the employees that wage rates for Respondent's certified nursing assistants were based on years of experience.

5 The information presented by Cates that morning caused concern for certified nursing assistants Booth and Schroeder. At the time of the meeting, Schroeder was being paid \$10.08 per hour. Yet, according to the information presented by Cates, Schroeder believed that based on her years of experience she should have been earning \$11.09 per hour. Similarly, at the
10 time of the meeting Booth was earning \$9.07 per hour. But, she had two years of experience prior to beginning her employment with Respondent, and based on the information presented by Cates, she believed that she should have been earning \$10.08 per hour.

15 Following the meeting, Fillinger approached Schroeder and they discussed Schroeder's wage rate. Fillinger knew that Schroeder was concerned about her wage rate because Schroeder had raised her hand during the meeting in response to a question from Gary Cates regarding wage rates and experience. Fillinger told Schroeder that she was surprised that Schroeder was not receiving the correct wage rate, but because of the Union's recently filed representation petition, she (Fillinger) was not sure that Respondent could correct Schroeder's
20 wage rate at that time. Fillinger further commented that she would have to check with Respondent's attorneys or Amie Richardson, Pro Medica's Director of Human Resources. Fillinger had no further discussions with Schroeder regarding her wage rate until February 28, more than one week after the election.

25 Connie Booth approached Fillinger following the February 7 meeting to ask about her wage rate. Booth told Fillinger that she was concerned that she was not being paid at the appropriate rate. Fillinger told Booth that she would look into it. On February 11, Fillinger called Booth into her office. Fillinger told Booth that she (Fillinger) had confirmed that Booth had, in fact, been certified for two years and should have been earning \$10.08 per hour. Fillinger went
30 on to tell Booth that Respondent could not do anything about Booth's wage rate at that time because of the representation petition filed by the Union. Booth asked Fillinger when she might see the adjustment to her wage rate, and Fillinger responded: "not until after we go to the bargaining table." Fillinger had no further discussions with Booth regarding her wage rate. The union election was held on February 20, 2003.

35 Respondent adjusted the wage rates of Booth and Schroeder but only after the election, on February 28, 2003. On February 28, 2003, Respondent issued checks to Booth and Schroeder covering the difference in the wage rate they were earning and the rate they should have been earning dating back to October 2002. Booth and Schroeder received paychecks
40 reflecting the change in their wage rate on March 7.

45 It is unlawful for an employer to make statements during an organizing campaign which attribute to the union the onus for the postponement of adjustments in wages and benefits or to otherwise disparage and undermine the union by creating the impression that it stood in the way of employees receiving planned wage increases and benefits. *Grouse Mountain Lodge*, 333 NLRB 1322, 1323-1324 (2001), citing *Atlantic Forest Products*, 282 NLRB 855, 858 (1987) and *Uarco, Inc.*, 169 NLRB 1153, 1154 (1969).

50 By her own admission, Fillinger told Booth and Schroeder that the adjustment in their wage rates could be delayed because the union had filed a representation petition. Fillinger's statements to Booth and Schroeder unambiguously attributed a possible delay in adjusting their wage rates on the Union's campaign. In terms of credibility, I find based on their demeanor and

the reasonableness of their testimony that Booth, Schroeder, and Fillinger were all trying to tell the truth and were basically credible even though their testimony varied slightly. Insofar as there are differences in their testimony I credit Booth and Schroeder over Fillinger.

5 Fillinger testified that she was “under the impression that she could not do anything with monies. . . because of the petition that the Union had filed against us.” It is well established that while an employer may postpone an expected wage adjustment during an organizing campaign, it may do so only if it makes clear that the sole purpose of the delay is to avoid the appearance of influencing the election’s outcome. *KMST-TV, Channel 46*, 302 NLRB 381, 382 (1991).

10 There is no evidence in the record that Fillinger ever gave such assurance to Booth or Schroeder. Indeed, there is no direct evidence in the record, nor any basis to infer, that Respondent actually had any concern that it might create the appearance of attempting to influence the election by merely correcting the wage rate rates of Schroeder and Booth. See, *Met West Agribusiness*, 334 NLRB 84 (2001). Accordingly, Fillinger’s statements to Booth and
15 Schroeder on February 7 and 11, violated Section 8(a)(1) of the Act.

It is obvious according to the testimony of all three (3) women that the Union election petition was the cause of delay in Booth and Schroeder having their pay adjusted to what it should be. If the attorneys or Amie Richardson had gotten back more quickly to Fillinger and
20 Booth and Schroeder had received what they supposed to receive prior to the election we might have a different outcome in this case. However, the pay of Booth and Schroeder was not corrected until 8 days after the election.

The remedy for this violation of Section 8(a)(1) of the Act should be a cease and desist
25 order and the posting of a notice.

C. The Union’s 3 Challenges

1. Overview

30 The Stipulated Election Agreement approved by the Regional Director called for an election amongst the employees of Respondent in the following appropriate unit:

35 “All full-time, regular part-time and contingent ancillary aides, CENAs, culinary associates, culinary coordinators, medical records clerks, recreation assistants, recreation coordinators, social services assistants, support services employees, lead ward clerks, and ward clerks employed by the Employer at its facility located at 700 Lakeshire Trail, Adrian, Michigan; but excluding registered nurses, other
40 professional employees, licensed practical nurses, other technical employees, business office employees, guards, and supervisors as defined in the Act.”

The Union challenges Barbara Stiers and Angela Colf on the grounds that they are supervisors as defined in the Act and therefore excluded from the unit. The Union challenges
45 Kathy Matthews on the grounds that she is a LPN (licensed practical nurse) and excluded from the unit. Further, Matthews does some LPN type work and the other duties she performs she does in conjunction with Laurie Preston, who is not in the unit, and Matthews therefore has no community of interest with the employees in the unit.

Respondent argues that the agreement between Respondent and the Union should
50 control and the ballots of Stiers, Colf, and Matthews should be opened and counted because their jobs are specifically included in the unit, i.e., Barbara Stiers is a culinary coordinator, Angela Colf is a recreation coordinator and Kathy Matthews is a social service assistant and

culinary coordinators, recreation coordinators, and social service assistants are specifically named as being in the unit and the Union should be bound by its agreement regarding the Stipulated Election Agreement.

5 The burden of proving that an individual is a statutory supervisor rests with the party asserting it. See *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). Section 2(11) of the Act defines "supervisor" as

10 "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

15 In *NLRB v. Kentucky River Community Care*, supra at 713, the Court stated Section 2(11) of the Act:

20 "sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions. (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment' and (3) their authority is held 'in the interest of the employer.'" *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 574 (1994).

25 2. Barbara Stiers

Respondent provides a daily food service for its residents. It operates a kitchen, which serves breakfast, lunch and dinner. The meals are prepared in the kitchen and served in the dining room.

30 The dietary department has ten to twelve employees that work on two different shifts. The dietary department manager is Barbara Stiers. On Union Exhibit 1, Monthly Staff Schedule Stiers is identified as "cook manager."

35 There are two bargaining unit classifications in the dietary department, aides and cooks. There is a cook on the first and the second shift each day. The first shift cook begins at 5:00 a.m. and works until 1:30 p.m. There are also a number of aides that work on the first shift and they work from 6:00 a.m. to 2:30 p.m. The second shift cook works from 11:30 a.m. to 7:30 p.m. There are also aides on the second shift. Prior to the election petition being filed on 40 January 15, 2003, second shift aides worked from 1:00 p.m. to 9:00 p.m. In late January, the hours of second shift aides were increased from 12:30 p.m. to 9:00 p.m. Aides and cooks receive a half hour of unpaid lunch per day.

45 Nancy Allwardt is an aide in the dietary department. On September 12, 2002, Allwardt filled out an application to work in the dietary department at Respondent's facility. Later that day, Stiers called Allwardt and set up an interview for September 13, 2002. On September 13, Stiers interviewed Allwardt. No one else was present during the interview and Stiers never left the room. The interview lasted approximately 30 to 45 minutes. At the conclusion of the 50 interview, Stiers offered Allwardt the position of aide in the dietary department. After that, they discussed Respondent's uniform policy for dietary department employees and Stiers told Allwardt her paperwork would be forwarded to human resources and an orientation would be

scheduled. Shortly thereafter, Allwardt attended an orientation. Allwardt began working for Respondent on September 23, 2002. Prior to beginning work at Respondent's facility the only Provincial House employee Allwardt met was Stiers. Stiers completed a Department Interview Form indicating she had hired Allwardt. Stiers signed the Interview Form on the line entitled
5 "Department Director's Signature." Union Exhibit 17

Stiers also interviewed and hired Cynthia Jones in October 2001. Union Exhibit 18. Fillinger testified she asks Stiers for recommendations on hiring dietary department employees. Fillinger has always followed Stiers' recommendations.

10 Allwardt testified that Stiers makes up the dietary department work schedule on a monthly basis. Stiers is listed on the schedule as the "cook manager." Allwardt testified that her schedule changes on a weekly basis, as does the schedule of other employees in the dietary department. Sometimes Allwardt works as many as five days a week and other weeks she only
15 works two or three days a week. Stiers decides when Allwardt and the other employees in the dietary department work. Stiers also decides whether cooks and aides will be accommodated on requests for days off. If Stiers decides an employee's request cannot be accommodated, she requires employees to work the schedule that is necessary to properly staff the kitchen.

20 On the schedule, the cook on the first shift is designated as "I" and the cook on the second shift is designated as "2." Aides are given various numbers between 3 and 6 each day, which designates their assignment for the day. Stiers designates herself as a "M" for manager.

25 Stiers also disciplines dietary department employees. When disciplining employees, Stiers signs the correction behavior report as the department director. Stiers signs absence and tardy reports for dietary employees as the supervisor. Allwardt was disciplined recently for absences. Stiers was present during the meeting about Allwardt's discipline and Stiers' documentation was used by Dietitian Savida Jindal.

30 When dietary department employees call in sick or cannot attend work, they must contact Stiers. Stiers also evaluates all dietary department employees as is required by state law. Stiers directs employees on the first and second shift with respect to job duties and special assignments. Stiers makes recommendations to Fillinger about overtime in the dietary department.

35 Stiers is invited to attend monthly LHA Senior Service Supervisor/Manager Group meetings held by Pro Medica. These meetings are conducted by Gary Cates, Senior Vice President of Senior Services for Pro Medica and Amie Richardson, a Director of Human Resources for Pro Medica. In these meetings, supervisors are taught how to manage
40 employees.

Stiers was invited to and attended a December 2, 2002 meeting held by Pro Medica to discuss the possibility of a union organizing drive at Provincial House. Also in attendance were Susan Fillinger, Shana Daykin, Gary Cates, Amie Richardson and numerous registered nurses.
45 Richardson admitted that only supervisors and not, she claimed, people who would might vote in a union election were invited to the meeting. At the meeting, Cates and Richardson explained what supervisors could say and not say to employees during a union organizing drive and management asked those at the meeting to keep them informed about what they learn about the union organizing effort. Fillinger testified that Stiers is the manager of the dietary
50 department.

Stiers makes \$12.21 per hour. Other dietary employees make between \$8.90 per hour and \$10.11 per hour.

Respondent claims that because the Stipulated Election Agreement includes the classification of culinary coordinators, the Union stipulated to Stiers' inclusion in the unit. However, the evidence at the hearing showed that Stiers is not a culinary coordinator, but the dietary department manager. The dietary department manager is not included in the unit description. Fillinger admitted that Stiers is a manager. Moreover, Stiers possesses supervisory status as defined in the Act and therefore was specifically excluded from the unit.

When one party claims that a position is contained within the stipulated bargaining unit, the Board uses a three pronged test. *Associated Milk Producers, Inc. v. NLRB*, 193 F.3d 539 (D.C. Cir. 1999); *Desert Palace d/b/a Caesars Tahoe*, 337 NLRB No. 170 p. 2 (2002). The first step is to examine the terms of the stipulated unit description to determine whether it is ambiguous. If the position is unambiguously described in the stipulated election agreement, the issue is resolved by the election agreement itself.

If the stipulation is ambiguous, the Board must determine the parties' intent through methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent cannot be discerned, the Board determines the bargaining unit by employing its normal community of interest test.

To determine whether the stipulation is clear or ambiguous, the Board compares the express descriptive language of the stipulation with the bona fide titles or job descriptions of the affected employees. *Viacom Cablevision*, 268 NLRB 633 (1984). Here, Stiers' bona fide title is dietary department manager or dietary coordinator. There is not a job description for a culinary coordinator. However, there is a job description for dietary coordinator, which accurately describes Stiers' job.

In *Viacom Cablevision*, the Board held that if an employee's title does not fit the stipulated election agreement's descriptive language, it will find a clear expression of intent and exclude the employee from the unit. 268 NLRB at 633. Here, Stiers' job title does not fit the descriptive language of inclusion in the unit, so Stiers was unambiguously excluded from the unit.

Additional evidence that Stiers was unambiguously excluded from the unit includes that in Fillinger's affidavit submitted in support of the Employer's Motion to Dismiss the Challenge of Stiers, she refers to Stiers as a dietary coordinator (GC Exh. 1(m)). The monthly dietary department staff schedule designates Stiers as a cook/manager (Union Exh. 1). A recent job description of Stiers' position is for a Dietary Coordinator (Union Exh. 13). This document states that the dietary coordinator is accountable for culinary associates and culinary assistants. The job description for a culinary associate states that they are accountable to the dietary manager (Union Exh. 14). Fillinger admitted that Stiers is the dietary department manager and that employees report to Stiers. In Stiers' evaluation for hand washing, she is referred to as the dietary supervisor. The attendance policy provision for Respondent states that absences and tardies are reported to the department head. Absences and tardies in the dietary department are reported to Stiers.

In departmental interview forms, Stiers signs as the department director. On absence and tardy reports, Stiers signs as a supervisor. On employee corrective behavior reports, Stiers signs as the department director. On performance evaluation assessment sheets for dietary employees, Stiers signs as the department director.

Therefore, the stipulated election agreement is unambiguous. Stiers' position is not included in the unit.

The only evidence to support the Employer's contention that Stiers is a culinary coordinator is a May 29, 2003 internal Pro Medica payroll document, which makes no distinction between aides and cooks (Resp. Exh. 19). It also includes a lead culinary associate that is not named in the stipulated election agreement (Resp. Exh. 19). The classifications on the internal Pro Medica payroll document are different than those used at Provincial House. Richarson admitted that she did not know what job titles were used at Provincial House.

The supervisory indicia enumerated in Section 2(11) of the Act are read in the disjunctive, so that possession of any one of the listed authorities can invest the individual with supervisory status. *NLRB v. Kentucky River Community Care, supra*. The evidence is overwhelming that Stiers is a supervisor. Stiers has numerous indicia of supervisory status. Stiers hires employees, disciplines employees, assigns employees, adjusts grievances and responsibly directs them using independent judgment. Therefore, Stiers is a statutory supervisor and the Union's challenge should be sustained. Stiers' ballot should not be opened and countered. Stiers did not testify.

3. Angela Colf

In October 2002, Angela Colf applied for the position of activities director at Provincial House (Union Exh. 5). Later in October, Colf was hired as the activities coordinator (Union Exh. 10).

The primary purpose of the activities director/coordinator is to provide an ongoing program of activities designed to meet, in accordance with the comprehensive assessment, the interest and the physical, mental and psycho-social well-being of each resident. (Union Exh. 10) The essential functions of an activities director/coordinator include participating and assisting in the completion of the comprehensive inter-disciplinary assessment and plan of care, and ongoing plan review processes; maintaining established department policies, procedures, objectives, qualify assurance programs and safety standards; preparing and setting up organized programs; and preparing activity staff work schedules (Union Exh. 10). The activities department includes three other employees and Colf also supervises volunteers who work with the department (Union Exh. 4).

Colf is an exempt employee whose rate of pay is \$16.85 per hour (Union Exh. 4). The other employees in the department are hourly and make between \$10.00 and \$11.90 per hour (Union Exh. 4). Colf attends monthly senior supervisor/managers group meetings, as did her predecessor, Travis Havens (Union Exh. 2; Res. Exh. 21). According to the August 1, 2000 job description for recreation assistant, they are accountable to and report to the activities director/coordinator (Union Exh. 12). Colf approves activities employees' requests for leave (Union Exh. 8). She also schedules employees for work (Union Exh. 10). Colf's predecessor, Travis Havens, attended middle management meetings and he evaluated the activities department employees. The evaluations are done pursuant to a directive from LHA or Pro Medica and are required by the State of Michigan for accreditation.

Colf worked for Provincial House in the 1990's as the activities director. When she returned in October 2002, she instituted new programs for the activities department employees to carry out with residents and instituted a new Sunday program at the order of Administrator Fillinger, which required employees to work on that day for the first time. Colf is a nationally certified activities director (Union Exh. 7). Colf is also on call for employees and is considered

part of the Administration at Provincial House (Union Exhs. 31, 32). Since Colf has returned to her employment at Provincial House in late 2002, no employee in that department has been hired or disciplined so there is no evidence that she ever hired or disciplined any employee in her department.

5 The Respondent claims that Colf is a "recreation coordinator" and therefore was specifically included in the bargaining unit by the stipulated election agreement. Once again, the evidence is contrary to Respondent's argument. Colf applied for the position of activities director (Union Exhs. 5, 6). Upon her employment, Colf along with administrator Susan Fillinger
10 signed a document stating she was the activities coordinator (Union Exh. 10). Fillinger testified Colf was called activities coordinator and activities director.

The evidence at the hearing showed that Colf is the activities coordinator or activities director. Therefore, the stipulated election unit unambiguously does not include her position.
15 See *Viacom Cablevision, supra*. The only evidence presented by Respondent that Colf is a "recreation coordinator" is an internal Pro Medica payroll document (Resp. Exh. 19). This document does not rebut the overwhelming evidence that Colf is the activities director/activities coordinator. Because Colf is a supervisor, which is a specific exclusion in the Stipulated Election Agreement I sustain the objection to Colf's ballot and her ballot should not be opened
20 and counted.

There is strong evidence that Angela Colf is a supervisor as defined in Section 2(11) of the Act. Because Colf is a relatively new supervisor, there is not as much evidence with respect to her position as there is for Stiers. However, evidence adduced at trial shows that Colf
25 schedules employees, assigns non-routine work to employees and directs employees in their tasks. In addition, there is also secondary indicia of supervisory status such as Colf's exempt status, she is paid significantly more than other activities department employees, she is nationally certified, she is considered part of the Administration of Provincial House, and very significantly attends meetings entitled "Senior Service Supervisor/Managers Group." Like
30 Stiers, Colf did not testify.

4. Kathy Matthews

The stipulated election agreement signed by the parties specifically excluded LPNs
35 (licensed practical nurses) from the unit. It is undisputed that Kathy Matthews is a LPN (Union Exh. 25). She has been a LPN since August 3, 2000 (Union Exh. 25).

Fillinger testified that Matthews' position at Provincial House was the admissions nurse. As admissions nurse, Matthews reviews referrals of possible residents to Provincial House.
40 Matthews also has input, along with Fillinger and the Director of Nursing, as to whether Provincial House will accept referrals based on the patient's medical condition. There are times Matthews makes the decision on referrals herself.

When Matthews began working in the admissions department, she replaced an
45 employee who was either a LPN or a RN. At the time, Fillinger was the Director of Nursing at Provincial House. Fillinger testified that she added job duties to Matthews' position, which required a LPN license. These duties were previously performed by ward nurses. The duties include documenting physician's orders, completing medical administration records (MAR), contacting physicians and ordering medications. It is undisputed that all of these duties must be
50 performed by a LPN or RN. As admissions nurse, Matthews also performs other functions that do not require a LPN certification, as do LPNs who work on the floor.

If Matthews is not present when a resident is admitted, the other employee in admissions, Laura Preston, cannot fulfill Matthews' functions. Preston is a social worker, not an LPN or an RN. She is not legally able to perform a significant part of Matthews' work. If Matthews is not present, a LPN or a RN must complete the admissions process.

Matthews also substitutes for RNs and LPNs at Provincial House. She passes medications to residents and performs treatments when necessary. You must be a LPN to perform these functions. Matthews has also administered TB tests to Provincial House employees. You must be a LPN to perform administer these tests.

Matthews attends in-service training for nurses. Matthews fills out documents, which state she is in the nursing department (Union Exh. 29). She receives the same perks and awards that nurses receive (Union Exh. 33). Matthews is paid in accordance with the LPN wage scale. Matthews is on the "on-call" list. No other voter in the unit was on the on-call list. No other employee who voted in the election was a LPN.

As stated above, when there is a dispute about whether an employee's job classification is with the stipulated election agreement, the Board looks at the language of the stipulation to determine whether it is ambiguous or unambiguous. Here, admittedly Matthews is the admissions nurse at Provincial House. It is undisputed that she is a LPN. Because the stipulated election agreement does not include admissions nurse as being part of the bargaining unit and specifically excludes LPNs, Matthews' job classification is unambiguously excluded.

Respondent argues that Matthews is the admissions/social services assistant. According to the admission/social services assistant job description, the employee must be currently licensed as a LPN in the State of Michigan (Union Exh. 30). Because Matthews is a LPN, and arguably, the admission/social services assistant, the stipulated election agreement may be ambiguous. If a stipulated election agreement is ambiguous with respect to a job classification, the Board looks at extrinsic evidence.

There are only two employees in the social service department, Matthews and Laura Preston. Preston is the social worker and is not a supervisory employee. Preston and Matthews work closely together in the admissions department and have some interchange of work. They are both supervised by administrator Sue Fillingier. The social services department is isolated from other employees in the bargaining unit and there is little contact or interchange with those employees. Preston and Matthews have similar working conditions, are paid similar wage rates, have the same hours and are both considered part of Administration at Provincial House (Union Exhs. 26, 31, 32). All parties concede that Preston is not a supervisor and also not in the bargaining unit.

If the stipulated election agreement does not unambiguously exclude Matthews and the extrinsic evidence is not determinative, then the Board looks at the community of interest of the employees.

In reviewing the community of interest, the Board reviews the following factors: the degree of functional integration; common supervision; the nature of employees' skills and functions; the interchangeability and contact among employees; work situs; general working conditions; and fringe benefits. Here, Matthews has no functional integration with the other bargaining unit employees. Matthews works in an office away from the residents in the admissions department. After a resident is admitted, she had little contact with residents unless she is filling in for a LPN or RN. Matthews does not have common supervision with other

bargaining unit employees. The admissions/social services department is supervised by Susan Fillinger. Preston and Matthews are supervised together.

5 With respect to the nature of employees' skills and functions, Matthews is a LPN. No other employee in the bargaining unit is a LPN. Matthews uses her skills as a LPN to perform her job as the admissions nurse. In addition, Matthews attends nursing in-service training.

10 Matthews' interchangeability and contact with other employees is extremely limited. Fillinger testified that Matthews works in the social services office, which is away from the wards, kitchen and laundry facilities. Fillinger testified that Matthews does not work with anyone else who voted in the election. Matthews works only with Laura Preston who neither party argues is in the stipulated bargaining unit. Fillinger testified that Matthews has very limited interchange with other employees who voted in the election.

15 With respect to work situs, Matthews is isolated from other employees in the social services office. With respect to general working conditions, Matthews is the only on-call employee who would be included in the bargaining unit. Preston and Matthews coordinate time off so there is always someone in the admissions department.

20 With respect to fringe benefits, Matthews is paid on the LPN wage scale. She is the only employee paid on that wage scale who voted. Matthews also receives the benefits and perks that other nurses receive.

25 The evidence shows that Matthews does not have a community of interest with other bargaining unit employees. As stated above, Matthews' community of interest is with Preston and both parties agree Preston was not eligible to vote in the election.

30 Accordingly, I sustain the challenge to Kathy Matthews' ballot. Her ballot should not be opened and counted. Like Stiers and Colf, Matthews did not testify.

5. Conclusory Paragraph on Challenged Ballots

35 Since I sustain the challenges to the ballots of Barbara Stiers, Angela Colf, and Kathy Matthews the opening of Christine Beck's ballot will not be determinative of the outcome of the election. The final tally of ballots if Beck's ballot is opened and counted will be either 36 to 34 in favor of representation by the Union or 37 to 33 in favor of representation by the Union. I will recommend that the Regional Director issue the appropriate certification of representation.

D. The Two Remaining Union Objections to the Election

40 Union objections 6 and 8 were as follows:

45 "6. The Employer, by its agents and representatives, told employees that they would suffer lost wages and/or benefits if the Union prevailed in the representation election, thereby destroying the laboratory conditions and interfering with the employees' free and fair choice in the election."

50 "8. The Employer, by its agents and representatives, improved wages, benefits and working conditions in response to the representation petition and Union activity, thereby destroying the laboratory conditions and interfering with the employees' free and fair choice in the election."

The evidence in support of Objection 6 came from witnesses Connie Booth and Nancy Brockway.

Booth credibly testified that she was a recent hire at Provincial House and worked a good deal of overtime. Overtime was given out on a first come first served basis and not on the basis of seniority.

At the February 7, 2003 meeting referred to above the question of overtime came up and Gary Cates, Pro Medica's Senior Vice President for Senior Services, in answer to a question said that overtime if the union got in might work the way it did at Pro Medica's nearby union facilities; Bixby Medical Center and Herrick Nursing Home, namely, overtime would be assigned based on seniority. Cates did not say it would necessarily be done on the basis of seniority but that it was possible.

Overtime based on seniority could impact adversely on Connie Booth since she was a new hire as a certified nursing assistant.

Cates' comment was not a threat that employees would lose wage and/or benefits if the Union prevailed in the representation election but a reasonable answer to a question. Arguably as many employees would benefit as would lose if overtime was based on seniority. Cates did not say that would definitely happen and common sense would lead one to conclude that a benefit such as overtime could be based on seniority.

Cates' statement on overtime is protected by Section 8(c) of the Act, which provides as follows:

"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

Cates did not testify.

Nancy Brockway, a 25-year veteran certified nursing assistant, testified that employee Pat Moran asked Gary Cates about yearly raises. Historically employees at Provincial House received a yearly raise in July of each year but in 2002 the yearly raise was not given until October. According to Brockway, Cates responded as follows: "He said that they would be — our wages — would be froze (sic) — until after we got a contract through the — with the union, if the union was voted in." Again, Cates did not testify and this testimony by Brockway is unrebutted.

It is well-settled that an employer's duty to maintain the status quo imposes an obligation upon the employer not only to maintain what it has already given its employees, but also to continue benefits in the future, which have become conditions of employment by virtue of commitment or practice. *More Truck Lines*, 336 NLRB No. 69 (2001). In *Illiana Transit Warehouse Corp.*, 323 NLRB 111 (1997), the employer violated the Act when it told employees the wages and benefits would be frozen at current levels for the period of negotiations. See also, *Wellstream Corp.*, 313 NLRB 698, 707 (1994); *Teksid Aluminum Foundry*, 311 NLRB 711, 717 (1993).

Here, the facts are identical. It is undisputed that employees at Provincial House received annual wage increases. It is un rebutted that Cates told employees that if the Union won the election, wages would be frozen until a contract was negotiated. This is objectionable conduct, which destroyed the laboratory conditions necessary to conduct a free and fair election and I sustain Union Objection 6.

Nancy Allwardt testified regarding Union Objection 8.

Allwardt works at Provincial House as an aide in the dietary department. Allwardt has worked at Provincial House since September 23, 2002. Allwardt works on the second shift. Between September 23, 2002 and January 15, 2003, when the Union petition was filed, the second shift employees in the dietary department began work at 1:00 p.m. and worked until 9:00 p.m. Employees received a half hour of unpaid lunch, so they were paid for seven and a half hours per day. After the Union election petition was filed, the hours of the second shift dietary department was increased by a half hour to eight hours per day. After the filing of the election petition, second shift employees in the dietary department reported to work at 12:30 p.m. and worked until 9:00 p.m. with a half hour unpaid lunch. This change represented a increase in the amount of hours worked by second shift dietary employees. Most second shift dietary employees worked between three and five days per week. The reason for the increased hours was never explained to the employees and occurred after the election petition was filed. Respondent at the hearing before me did not present any evidence as to why the hours were increased.

The granting of a benefit during the critical period between election petition and the election is objectionable if it is done for the purpose of influencing the employee's vote in the election and was reasonably calculated to have that effect. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). As a general rule, an employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene. *R. Dakin & Co.*, 284 NLRB 98 (1987); *Red's Express*, 268 NLRB 1154, 1155 (1984).

In determining whether a grant of benefits is objectionable, the court has drawn the inference that benefits granted during the critical period are coercive. However, an employer may rebut the inference by coming forward with an explanation, other than the pending election, for the timing of the grant or announcement of such benefits. *Uarco, Inc.*, 216 NLRB 1, 2 (1974).

In *Maremont Corp.*, 294 NLRB 11, 15-16 (1989), a shift change during the critical period constituted an unlawful granting of benefits.

Here, it is undisputed that the Employer granted second shift dietary employees a benefit during the critical time period by increasing their paid hours from 7-1/2 hours to 8 hours per day. Provincial House presented no evidence to rebut the inference of objectionable conduct by coming forward with an explanation. They gave no explanation as to why the second shift dietary employees' hours were increased during the critical period. Nor was any other evidence presented as to why the second shift dietary employees received the benefit of additional hours during the critical period. Therefore, Respondent failed to rebut the inference that the benefit granted during the critical period was coercive. I sustain Union Objection 8.

I will recommend that case 7-RC-22397 be remanded to the Regional Director for Region 7 to issue a certification of results of election to reflect that a majority of the valid ballots cast in the election were in favor of representation by the Union.

Since I sustain Union Objections 3 and 4, which parallel the unfair labor practice allegations, and Union Objections 6 and 8, if I am reversed regarding my sustaining the challenges to Stiers, Colf and Matthews and their votes and that of Beck are counted and the Union loses the election I recommend that because of those union objections which I sustain that the election results, if the Union loses, should be set aside and a new election ordered.

Conclusions of Law

1. Respondent, Lenawee Long Term Care, Inc. d/b/a Provincial House of Adrian, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Local 876, United Food and Commercial Workers International Union, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act when on February 7 and 11, 2003 it told employees that they could not receive pay increases or corrections to their rate of pay because of the organizing campaign by the Union.

4. The above violation of the Act is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondent, Lenawee Long Term Care, Inc. d/b/a Provincial House of Adrian, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling it employees that they can not receive pay increases or corrections to their pay because of the organizing campaign by the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by law.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service of the Region, post a copy of the attached notice marked "Appendix" at its facility in Adrian, Michigan.² Copies of the notice, on forms provided

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

² If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

It is further ordered that case 7-RC-22397 be remanded to the Regional Director for Region 7 to issue a certification of results of election because a majority of the valid ballots have been cast in favor of representation by the Union and that the Union is the exclusive representative of these bargaining unit employees.

Dated, Washington, D.C., August 14, 2003

Martin J. Linsky
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT tell our employees that they can not receive pay increases or corrections to their rate of pay because of the organizing campaign by the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal law.

LENAWEE LONG TERM CARE, INC. D/B/A
PROVINCIAL HOUSE OF ADRIAN

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

477 Michigan Avenue, Federal Building, Room 300, Detroit, MI 48226-2569
(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3244.